

D and E of this part, and shall not accept for filing any attestation submitted by the employer under subparts D and E of this part, for a period of 12 months from the date of receipt of the Administrator's notification or for a longer period if such is specified by the Attorney General for visa petitions filed by that employer under section 212(m) of the INA.

§ 655.460 Non-applicability of the Equal Access to Justice Act.

A proceeding under subpart D or E of this part is not subject to the Equal Access to Justice Act, as amended, 5 U.S.C. 504. In such a proceeding, the administrative law judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

Subpart F—Attestations by Employers Using Alien Crewmembers for Longshore Activities in U.S. Ports

SOURCE: 60 FR 3956, 3976, Jan. 19, 1995, unless otherwise noted.

GENERAL PROVISIONS

§ 655.500 Purpose, procedure and applicability of subparts F and G of this part.

(a) *Purpose.* (1) Section 258 of the Immigration and Nationality Act ("Act") prohibits nonimmigrant alien crewmembers admitted to the United States on D-visas from performing longshore work at U.S. ports except in five specific instances:

(i) Where the vessel's country of registration does not prohibit U.S. crewmembers from performing longshore work in that country's ports and nationals of a country (or countries) which does not prohibit U.S. crewmembers from performing longshore work in that country's ports hold a majority of the ownership interest in the vessel, as determined by the Secretary of State (henceforth referred to as the "reciprocity exception");

(ii) Where there is in effect in a local port one or more collective bargaining agreement(s), each covering at least thirty percent of the longshore work-

ers, and each permitting the activity to be performed under the terms of such agreement(s);

(iii) Where there is no collective bargaining agreement covering at least thirty percent of the longshore workers at the particular port and an attestation with accompanying documentation has been filed with the Department of Labor attesting that, among other things, the use of alien crewmembers to perform a particular activity of longshore work is permitted under the prevailing practice of the particular port (henceforth referred to as the "prevailing practice exception");

(iv) Where the longshore work is to be performed at a particular location in the State of Alaska and an attestation with accompanying documentation has been filed with the Department of Labor attesting that, among other things, before using alien crewmembers to perform the activity specified in the attestation, the employer will make a bona fide request for and employ United States longshore workers who are qualified and available in sufficient numbers from contract stevedoring companies, labor organizations recognized as exclusive bargaining representatives of United States longshore workers, and private dock operators (henceforth referred to as the "Alaska exception"); or

(v) Where the longshore work involves an automated self-unloading conveyor belt or vacuum-actuated system on a vessel and the Administrator has not previously determined that an attestation must be filed pursuant to this part as a basis for performing those functions (henceforth referred to as the "automated vessel exception").

(2) The term "longshore work" does not include the loading or unloading of hazardous cargo, as determined by the Secretary of Transportation, for safety and environmental protection. The Department of Justice, through the Immigration and Naturalization Service (INS), determines whether an employer may use alien crewmembers for longshore work at U.S. ports. In those cases where an employer must file an attestation in order to perform such work, the Department of Labor shall be responsible for accepting the filing of

such attestations. Subpart F of this part sets forth the procedure for filing attestations with the Department of Labor for employers proposing to use alien crewmembers for longshore work at U.S. ports under the prevailing practice exception, the Alaska exception, and where it has been determined that an attestation is required under the automated vessel exception listed in paragraph (a)(1)(iv) of this section. Subpart G of this part sets forth complaint, investigation, and penalty provisions with respect to such attestations.

(b) *Procedure.* (1) Under the prevailing practice exception in sec. 258(c) of the Act, and in those cases where it has been determined that an attestation is required under the automated vessel exception for longshore work to be performed at locations other than in the State of Alaska, the procedure involves filing an attestation with the Department of Labor attesting that:

(i) The use of alien crewmembers for a particular activity of longshore work is the prevailing practice at the particular port;

(ii) The use of alien crewmembers is not during a strike or lockout nor designed to influence the election of a collective bargaining representative; and

(iii) Notice of the attestation has been provided to the bargaining representative of longshore workers in the local port, or, where there is none, notice has been provided to longshore workers employed at the local port.

(2) Under the automated vessel exception in sec. 258(c) of the Act, no attestation is required in cases where longshore activity consists of the use of an automated self-unloading conveyor belt or vacuum-actuated system on a vessel. The legislation creates a rebuttable presumption that the use of alien crewmembers for the operation of such automated systems is the prevailing practice. In order to overcome such presumption, it must be shown by the preponderance of the evidence submitted by any interested party, that the use of alien crewmembers for such activity is not the prevailing practice at the particular port, that it is during a strike or lockout, or that it is intended or designed to influence an elec-

tion of a bargaining representative for workers in the local port.

(3) Under the Alaska exception in sec. 258(d) of the Act, and in those cases where it has been determined that an attestation is required under the automated vessel exception consisting of the use of such equipment for longshore work to be performed in the State of Alaska, the procedure involves filing an attestation with the Department of Labor attesting that:

(i) The employer will make a bona fide request for United States longshore workers who are qualified and available in sufficient numbers to perform the activity at the particular time and location from the parties to whom notice has been provided under paragraph (b)(3)(iv) (B) and (C) of this section, except that:

(A) Wherever two or more contract stevedoring companies which meet the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932) have signed a joint collective bargaining agreement with a single labor organization recognized as an exclusive bargaining representative of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*), the employer may request longshore workers from only one such contract stevedoring company, and

(B) A request for longshore workers to an operator of a private dock may be made only for longshore work to be performed at that dock and only if the operator meets the requirements of section 32 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 932);

(ii) The employer will employ all United States longshore workers made available in response to the request made pursuant to paragraph (b)(3)(i) of this section who are qualified and available in sufficient numbers and who are needed to perform the longshore activity at the particular time and location attested to;

(iii) The use of alien crewmembers for such activity is not intended or designed to influence and election of a bargaining representative for workers in the State of Alaska; and

(iv) Notice of the attestation has been provided to:

(A) Labor organizations which have been recognized as exclusive bargaining representatives of United States longshore workers within the meaning of the National Labor Relations Act (29 U.S.C. 141 *et seq.*) and which make available or intend to make available workers to the particular location where the longshore work is to be performed;

(B) Contract stevedoring companies which employ or intend to employ United States longshore workers at that location; and

(C) Operators of private docks at which the employer will use longshore workers.

(c) *Applicability.* Subparts F and G of this part apply to all employers who seek to employ alien crewmembers for longshore work at U.S. ports under the prevailing practice exception, to all employers who seek to employ alien crewmembers for longshore work at locations in the State of Alaska under the Alaska exception, to all employers claiming the automated vessel exception, and to those cases where it has been determined that an attestation is required under the automated vessel exception.

§ 655.501 Overview of responsibilities.

This section provides a context for the attestation process, to facilitate understanding by employers that may seek to employ alien crewmembers for longshore work under the prevailing practice exception, under the Alaska exception, and in those cases where an attestation is necessary under the automated vessel exception.

(a) *Department of Labor's responsibilities.* The United States Department of Labor (DOL) administers the attestation process. Within DOL, the Employment and Training Administration (ETA) shall have responsibility for setting up and operating the attestation process; the Employment Standards Administration's Wage and Hour Division shall be responsible for investigating and resolving any complaints filed concerning such attestations.

(b) *Employer attestation responsibilities.* (1) Each employer seeking to use alien crewmembers for longshore work at a

local U.S. port pursuant to the prevailing practice exception or where an attestation is required under the automated vessel exception for longshore work to be performed at locations other than in the State of Alaska shall, as the first step, submit an attestation on Form ETA 9033, as described in § 655.510 of this part, to ETA at the address set forth at § 655.510(b) of this part. If ETA accepts the attestation for filing, pursuant to § 655.510 of this part, ETA shall return the cover form of the accepted attestation to the employer, and, at the same time, shall provide notice of the filing to the Immigration and Naturalization Service (INS) office having jurisdiction over the port where longshore work will be performed.

(2) Each employer seeking to use alien crewmembers for longshore work at a particular location in the State of Alaska pursuant to the Alaska exception or where an attestation is required under the automated vessel exception for longshore work to be performed at a particular location in Alaska shall submit, as a first step, an attestation on Form ETA 9033-A, as described in § 655.533 of this part, to ETA at the address of the Seattle regional office as set forth at § 655.532 of this part. The address appears in the instructions to Form ETA 9033-A. ETA shall return the cover form of the accepted attestation to the employer, and, at the same time, shall provide notice of the filing to the INS office having jurisdiction over the location where longshore work will be performed.

(c) *Complaints.* Complaints concerning misrepresentation in the attestation, failure of the employer to carry out the terms of the attestation, or complaints that an employer is required to file an attestation under the automated vessel exception, may be filed with the Wage and Hour Division, according to the procedures set forth in subpart G of this part. Complaints of "misrepresentation" may include assertions that an employer has attested to the use of alien crewmembers only for a particular activity of longshore work and has thereafter used such alien crewmembers for another activity of longshore work. If the Division determines that the complaint presents